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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 220

WALTER FORD GORMLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 94–100)[1] is reported at 136 F. (2d) 227.

JURISDICTION

The judgment of the circuit court of appeals was entered June 9, 1943 (R. 101), and a petition for rehearing was denied July 2, 1943 (R. 101–102). The petition for a writ of certiorari was

[1] The record is in two volumes consecutively paginated but separately entitled, respectively, "Transcript of Record" and "Bill of Exceptions." Both are designated herein as Record (R.).

filed August 2, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment was returned before the close of the term of court for which the grand jury returning it had been convened.

2. Whether section 5 (g) of the Selective Training and Service Act of 1940, and the Selective Service Regulations issued thereunder, requiring assignment of conscientious objectors to work of national importance under civilian direction, are valid.

3. Whether petitioner knowingly violated a valid order of his draft board to report for assignment.

4. Whether petitioner was deprived of a fair trial by the inclusion of former postal employees on the jury panel, by the conduct of the trial judge or the prosecutor, by rulings on the admission and exclusion of evidence, or by the charge to the jury.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 23–29.

STATEMENT

On October 1, 1940, in a one-count indictment filed in the District Court of the United States for

the Eastern District of Wisconsin, petitioner was charged with having "knowingly, wilfully and unlawfully" disobeyed an order of Local Board No. 2 of Milwaukee, Wisconsin, that he, as a conscientious objector to noncombatant as well as combatant military service, report to the Board on August 24, 1942, for work of national importance (R. 2).[2] He was found guilty by a jury (R. 22, 88) and was sentenced, after rejecting the court's offer to permit him to obey the Board's order in lieu of sentence, to five years' imprisonment (R. 90–91). Upon appeal to the Circuit Court of Appeals for the Seventh Circuit, the conviction was unanimously affirmed (R. 94–101).

Petitioner is 28 years of age and holds a degree in Mechanical Engineering from Iowa State College (R. 64, 81–82). His conscientious objection to military service is not based on any tenets of the Methodist Church, of which he is a member (R. 65, 82), but rather on philosophical readings (R. 64). He registered with the local board on October 16, 1940, stating on his questionnaire that he was opposed to noncombatant as well as com-

[2] Petitioner's motion for a bill of particulars (R. 9–11) was granted in part (R. 11–15). His motions for particulars as to the grand jury proceedings and to inspect the grand jury minutes (R. 3–8), his demurrer and motion to quash the indictment (R. 17–20), and his plea in abatement (R. 22–27) and in bar (R. 27–29), were denied (R. 4–5, 8, 21), as were his subsequent motions to dismiss, for a directed verdict, new trial, judgment notwithstanding the verdict, and in arrest of judgment (R. 21–22, 66, 83, 89–90).

batant military service (R. 60, 64). He was placed originally, on August 27, 1941, in Class IV–E–L.S. (limited service) (R. 60).[3] At a subsequent meeting of the board on March 28, 1942, he was reclassified by vote of the board into Class IV–E,[4] (R. 60–62). By virtue of such classification he was thereafter assigned by the Director of Selective Service (R. 71–73) to the Merom Camp, a Civilian Public Service Camp established to carry on work of national importance under civilian direction (R. 68–69). Pursuant to an order received from General Hershey (R. 73), the local board on August 11, 1942, issued and sent to petitioner by mail an order, signed by Louis Davlin, a member who was also the secretary (R. 61), directing petitioner to report at the board's headquarters at 10 A. M. on August 24, 1942, for transportation to the Merom Camp (R. 13, 60, 72). Petitioner received the order (R. 63, 65, 82). He testified that at 10 A. M. on August 24, 1942, he reported to the United States District Attorney's office and told an Assistant District Attorney that he was sup-

[3] This classification was later discontinued. *Selective Service Regulation* 622.52.

[4] This is the classification provided for conscientious objectors to noncombatant as well as combatant military service who have no basis for exemption or deferment and who would, therefore, be placed in Class I–A were it not for their convictions based on religious training and belief. *Selective Service Regulation* 622.51.

posed to report to the board but was reporting to the District Attorney's office instead (R. 83). Petitioner did not at any time report to the board in compliance with its order (R. 60–61, 63, 83), and upon a delinquency notice being sent him (R. 60, 82), he wrote the board saying that he would not go to a Civilian Public Service Camp "because in accepting conscription into such a camp I participate in one of the activities of the war machine, and thus become an accessory to murder on the battlefield" (R. 65).

ARGUMENT

I

Petitioner's contention (Pet. 38–40) that both the return of the indictment and the facts constituting the offense charged therein occurred after the close of the term of court for which the grand jury returning it had been convened, was rejected by the circuit court of appeals (R. 96) on the basis of its decision of an identical issue in *Mroz* v. *United States,* 136 F. (2d) 221, 224, in which a petition for certiorari, No. 239, this Term, was filed in this Court on August 6, 1943, but which was withdrawn on September 1, 1943, upon stipulation of the parties.

Terms of Court for the District Court of the United States for the Eastern District of Wisconsin are fixed by statute (28 U. S. C. 195) to commence at Milwaukee on the first Mondays of January and October, at Green Bay on the first

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Tuesday in April, and at Oshkosh on the second Tuesday in June. No termination dates are fixed by statute or by court rule.[5] The grand jury indicting petitioner was convened for the regular term beginning at Milwaukee in January 1942, and returned the indictment on October 1, 1942 (R. 2), which fell on Thursday, prior to the commencement of the October Term. Petitioner does not contend that the January Term was ever adjourned *sine die*. But it is well settled that in the absence of a fixed termination date, a term of court commenced at the time and place provided by statute continues until it is adjourned *sine die* or until the next term at that place commences.[6] This rule applies although another term has commenced at another place in the same district.[7]

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[5] Rule 6 of the Rules of the United States District Court for the Eastern District of Wisconsin provides: "Each Monday at 10:00 a. m. (except during the month of August), at the Court Room in the city of Milwaukee, Wisconsin, is designated as motion day. All motions in causes, civil, criminal, in admiralty, or in bankruptcy, which require notice and hearing, will be disposed of at such times. * * *" This rule clearly presupposes that the January term at Milwaukee survives the commencement of the April and June terms at Green Bay and Oshkosh, respectively.

[6] *Harlan* v. *McGourin*, 218 U. S. 442, 450; *United States* v. *Rasmussen*, 95 F. (2d) 842, 843 (C. C. A. 10); *East Tennessee Iron & Coal Co.* v. *Wiggin*, 68 Fed. 446, 447 (C. C. A. 6); *United States* v. *Perlstein*, 39 F. Supp. 965, 968 (D. N. J.), affirmed, 126 F. (2d) 789 (C. C. A. 3), certiorari denied, 316 U. S. 678.

[7] *Harlan* v. *McGourin*, *supra*, n. 6. That there may be concurrent grand juries at different places within a single

Since the absence of the judge does not operate to end a term of court properly commenced,[8] and since judges from other districts may be specially assigned (28 U. S. C. 17), it cannot successfully be contended that by providing for several terms of court at different places in a district to which only one judge is regularly assigned, Congress "must have intended" (Pet. 39) that each term should end upon the commencement of a term at another place in the same district.[9] We submit,

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judicial district during different terms seems clear. 28 U. S. C. 421; *United States* v. *Perlstein*, *supra*, n. 6; cf. *Borgia* v. *United States*, 78 F. (2d) 550, 552–553 (C. C. A. 9).

[8] *Harlan* v. *McGourin*, *supra*, n. 6; *Commonwealth* v. *Bannon*, 97 Mass. 214, 219 (1867); *In re Estate of Hunter*, 84 Ia. 388, 391–392 (1892).

[9] Petitioner cites the lower court in *Ex parte Harlan*, 180 Fed. 119, 132 (C. C. N. D. Fla.), affirmed in *Harlan* v. *McGourin*, *supra*, n. 6, as having stated that where terms of court are created to commence at different places within a district where there is only one judge, a legislative intent is evinced to interrupt the sittings of the court for each place named by the commencement of a new term at the new place (Pet. 39). What the lower court actually said is as follows (pp. 132–133):

"Section 658 of the Revised Statutes * * * provides that the regular term of the Circuit Courts for the Northern District of Florida shall be held in each year at Tallahassee on the first Monday in February, and at Pensacola on the first Monday in March. * * * the plain command of the statute is that the Circuit Court must commence to sit at Pensacola on the first Monday in March of each year, and have the succeeding 12 months in which to sit for the dispatch of business; * * * This full 12 months, in which this court may dispatch its business, is contemplated here, notwithstanding the requirement of the regular session at

therefore, that the indictment in the present case was not returned out of time.

II

Petitioner's contentions addressed to the constitutionality of Section 5 (g) of the Selective Training and Service Act and of the Regulations issued thereunder are without merit.[10] Military service may be required regardless of personal feelings or religious beliefs, and does not constitute involuntary servitude or slavery.[11] An exemption therefrom is the result of Congressional discretion rather than of constitutional mandate.[12] Petitioner apparently concedes as much, but contends that these principles, being founded on the

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Tallahassee each year. There are five judges who may sit in the Circuit Court aside from those who may be specially designated * * *. The requirement to hold the Circuit Court at Tallahassee does not, therefore, evince any legislative intention to interrupt the sittings of the court at Pensacola during the regular March term."

[10] Our discussion in this part of the Argument is directed principally to petitioner's reliance on the First and Thirteenth Amendments, delegation of powers principles, and the "void for vagueness" rule (Pet. 28–37, 45–47). Space limitations forbid our dealing *seriatim* with all of the many contentions by petitioner, constitutional and otherwise, that the court below properly regarded as too trivial for mention (R. 99).

[11] *Selective Draft Law Cases*, 245 U. S. 366; *Jones* v. *Perkins*, 245 U. S. 390; *Angelus* v. *Sullivan*, 246 Fed. 54, 59–60 (C. C. A. 2); *United States* v. *Sugar*, 243 Fed. 423, 428 (E. D. Mich.); see *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29.

[12] *United States* v. *MacIntosh*, 283 U. S. 605, 622; *Rase* v. *United States*, 129 F. (2d) 204, 210 (C. C. A. 6); *Hamilton* v. *Regents*, 293 U. S. 245, 263–264.

power to raise armies, do not authorize the conscription of men for other than military service (Pet. 29). That a provision for assigning conscientious objectors to work of national importance under civilian direction is a necessary and proper adjunct, however, to the execution of the power to wage war and raise armies, is demonstrated by the nature of the problems faced by the nation while at war, both in 1917–1918 and at the present time.

The Selective Draft Act of 1917 exempted conscientious objectors only from combatant service,[13] and the army experienced serious difficulty in handling conscripts opposed to noncombatant service. The Furlough Law of March 16, 1918,[14] made it possible for conscientious objectors to be furloughed to engage in work under civilian direction. Theretofore, and even thereafter in the case of one failing to avail himself of a furlough, a conscientious objector refusing to perform noncombatant military service was subject to punishment by the military authorities.[15] The presence of such persons in the army presented a problem of discipline and morale.

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[13] Act of May 18, 1917, c. 15, sec. 4, 40 Stat. 76, 78–79 (50 U. S. C. App. 204).

[14] Act of March 16, 1918, c. 23, 40 Stat. 450.

[15] See *Statement Concerning the Treatment of Conscientious Objectors in the Army* (June 18, 1919), prepared and published by direction of the Secretary of War.

This experience of the first world war showed the propriety of making a different provision for registrants opposed by religious training and belief to noncombatant as well as to combatant military service. Relieving them entirely of any obligation to render any service would obviously not accord with the principle of equality upon which the Selective Training and Service Act of 1940 is based.[16] A solution was reached by providing for their compulsory assignment to work of national importance, under civilian direction.[17] As conscription of conscientious objectors for military service is within Congressional power, their assignment to work analogous to noncombatant service in the armed forces, but under civilian direction to avoid

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[16] 50 U. S. C. App. 301 (b), *infra*, p. 23.

[17] By virtue of the authority vested in him by the Act, the President authorized the Director of Selective Service to designate or establish work of national importance. Executive Order No. 8675 (Feb. 6, 1941), 6 Fed. Reg. 831–832. In turn the Director has so designated certain camp projects, including the one at Merom, Indiana, to which petitioner was assigned (Def. Ex. C; R. 68–69). These camps are managed, subject to the direction of the Director of Selective Service, by the National Service Board for Religious Objectors, a private organization representing various religious groups. The actual work project in each camp is under the direction of technical agencies such as the United States Departments of Agriculture and the Interior. Over-all authority and responsibility is in the Director of Selective Service, who has prescribed regulations for the operation and governance of the camps. 6 Fed. Reg. 2001–2003 (April 11, 1941); 32 C. F. R., 1941 Supp., 653.1–23.

offending their own consciences, is clearly within Congressional power. Congress has not, as petitioner contends (Pet. 30), annexed an unconstitutional condition to a privilege, but has provided for a draft of manpower for two different purposes: service in the armed forces, and work of national importance of a nonmilitary character. The line between the two is drawn in part on the basis of the individual registrant's usefulness. Congress has regarded men forty-five or over as less useful for the present in military than in nonmilitary service.[18] It has likewise so regarded conscientious objectors, whose mental attitude sufficiently impairs their military usefulness to render their induction into military service unnecessary in the nation's interest if another form of service can be found for them in lieu thereof. As he is of an age and physical capacity for military service, and not within an otherwise deferred classification,[19] petitioner is in no position to com-

[18] However, in requiring registration of men from forty-five to sixty-five (Act of Dec. 20, 1941, c. 602, sec. 1, 55 Stat. 844; 50 U. S. C., Supp. I, 302), Congress undoubtedly was preparing for a possible need for their services. Petitioner's arguments, if sound, cannot be limited in their application to conscientious objectors, but would mean that the reservoir of registered men forty-five or over may never be conscripted for other than military purposes.

[19] The record shows no claim for deferment made by petitioner. His attempt at the trial to show that he was already doing work of national importance was irrelevant, as the trial court correctly held by excluding the proffered testi-

plain that compulsory nonmilitary service has as yet been required, under the Selective Training and Service Act, only of his own class. That he would be in military service apart from the single circumstance of his being a conscientious objector, is a sufficient basis for his being treated differently from those allowed to remain in civilian life for other reasons. Also, having applied for and been granted the classification in which he finds himself, he is not entitled to complain of its disadvantages in comparison with the military service (see R. 70, 75).

Nothing in the Act or Regulations, or in the fact that religious organizations participate in the management of Civilian Public Service Camps, in any way supports petitioner's contention (Pet. 45–47) that their establishment and operation interfere with freedom of religion. On the contrary, reliance by the Director of Selective Service on various religious organizations for voluntary aid in the operation of these camps, under his direction, goes far to secure the free exercise of religious convictions that forbid participation in war. Petitioner, as a Methodist, cannot properly contend (Pet. 46) that the principles of other denominations are being forced upon him by virtue of the fact that his own denomination, which does

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mony (R. 74–75). Courts and juries cannot be substituted for the Selective Service organization in the granting of deferments, without paralyzing the effectiveness of the Act.

not officially sanction his attitude (R. 65), has not sought to be represented (if this be true) on the National Service Board for Religious Objectors.

Against the challenge of unconstitutional delegation of legislative power, both the Selective Draft Act of 1917 [20] and the present Act [21] have already been sustained. Delegation to the President as Commander in Chief has at least as strong a basis as the broad delegation to him of the power of laying an embargo on the export of arms, which was sustained (*United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 314–329) without reference to ordinary principles of delegation for the reason that the matter was one of foreign relations over which the President has an independent constitutional authority. Petitioner's contentions of unconstitutional delegation (Pet. 31–32) proceed upon a premise that Congress has not established a standard for determining what is "civilian direction" or "work of national import-

[20] *Selective Draft Law Cases*, 245 U. S. 366, 389; *United States ex rel. Bergdoll* v. *Drum*, 107 F. (2d) 897, 901 (C. C. A. 2); *Angelus* v. *Sullivan*, 246 Fed. 54, 60 (C. C. A. 2); *Franke* v. *Murray*, 248 Fed. 865, 869 (C. C. A. 8); *United States* v. *Sugar*, 243 Fed. 423, 434 (E. D. Mich.). Section 4 of the 1917 Act (50 U. S. C. App. 204) provided that conscientious objectors "shall not be exempted from service in any capacity that the President shall declare to be noncombatant."

[21] *Seele* v. *United States*, 133 F. (2d) 1015, 1019–1020 (C. C. A. 8).

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ance." But "civilian direction" is obviously the antithesis of the "military direction" from which persons such as petitioner seek exemption. The requirement that they be assigned to "work of national importance" means that they, too, must contribute to the national well-being, but on a basis deemed not in conflict with their religious convictions. The Constitution does not require that Congress undertake the multitudinous burden of specifying all the kinds of work that are of national importance. Instead, the designation of work projects, such as the Merom Camp project to which petitioner was assigned, is appropriately left for administrative action. Matters of administrative detail, on which it is not reasonably practical for Congress to legislate, may clearly be left, within the framework of the primary standard established by Congress, to the discretion of the President and the Director of Selective Service.[22]

Petitioner's contention that the Act unconstitutionally delegates judicial powers to administrative agencies (Pet. 32–34) is equally devoid of merit,[23] as is his still further contention that the

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[22] *Currin* v. *Wallace*, 306 U. S. 1, 17; *Opp Cotton Mills, Inc.*, v. *Administrator*, 312 U. S. 126, 144; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 574; *United States* v. *Grimaud*, 220 U. S. 506, 516.

[23] This contention is founded on the erroneous premise that assignment to a Civilian Public Service camp is a "sentence" to imprisonment. Compulsory public service in time of war in lieu of military servce is not imprisonment, and the Selective Service boards do not impose sentences. Their functions are administrative rather than judicial; consequently, there

Act, and consequently the indictment, are so vague as not to provide an ascertainable standard of guilt (Pet. 34–37). In connection with the latter contention, petitioner overlooks the fact that whether the work to which he has been assigned is work of national importance under civilian direction is not a question for the court or the jury to decide in the determination of his guilt, or for him to have decided beforehand in determining what was required of him. Section 11 of the Act made it his legal duty to obey the order of the Board to report at its headquarters at 10:00 a. m. on August 24, 1942, and punishes intentional disobedience. This duty was not vague or unascertainable.[24] The indictment, following the language of the statute and of the Board's order to report, fully apprised petitioner of the nature of the charge against him so as to enable him properly to plead his defense and an acquittal or conviction in bar of a further prosecution for the same offense, and enabled the court to determine whether the charges were sufficient in law to support a conviction.[25]

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has been no unconstitutional delegation to them of judicial power. *Selective Draft Law Cases*, 245 U. S. 366, 389. The same reasoning disposes of petitioner's contention that in its application to conscientious objectors the Act is a "bill of pains and penalties" (Pet. 34) and therefore invalid. Cf. *United States ex rel. Pfefer* v. *Bell*, 248 Fed. 992, 993, (E. D. N. Y.).

[24] Cf. *Gorin* v. *United States*, 312 U. S. 19, 27–28.

[25] *Wong Tai* v. *United States*, 273 U. S. 77, 80; *United States* v. *Behrman*, 258 U. S. 280, 288; *Kaufmann* v. *United*

Petitioner is now contending (Pet. 3, 38) for the first time that Section 625.2 of the Selective Service Regulations (32 C. F. R. 652.2), by denying registrants representation by counsel in proceedings before the local boards, constitutes a denial of due process of law. This contention, so belatedly raised, should not now be open to him.[26] Furthermore, he has not shown that he ever asserted a right to be represented before the Board by counsel, or that such alleged right was ever denied him. Moreover, the Board gave him what he asked, which was to be classified as a conscientious objector (R. 60), so that in any event he was in no way prejudiced by lack of counsel in the proceedings before the Board and therefore may not complain of it.[27]

States, 282 Fed. 776, 778 (C. C. A. 3), certiorari denied, 260 U. S. 735; *Rose* v. *United States*, 128 F. (2d) 622, 624 (C. C. A. 10), certiorari denied, 317 U. S. 651. The indictment clearly was not deficient, as petitioner contends (Pet. 37), because of its failure to allege that the assignment in question was in lieu of induction into the armed forces, or that the work was to be under civilian direction. Even on the assumption that petitioner is correct in calling these requirements a "proviso" of the statutory authority, it is nevertheless well settled that an indictment, founded on a general provision defining the elements of the offense, need not negative the basis for an exception made by a proviso or other distinct clause, and that it is incumbent on one who relies on such a proviso to set it up and establish it. *McKelvey* v. *United States*, 260 U. S. 353, 357; *Seele* v. *United States*, 133 F. (2d) 1015, 1019 (C. C. A. 8); *Nicoli* v. *Briggs*, 83 F. (2d) 375, 379 (C. C. A. 10).

[26] See *Sonzinsky* v. *United States*, 300 U. S. 506, 514.

[27] *Lehon* v. *City of Atlanta*, 242 U. S. 53, 56.

III

The validity of the statutory basis of the Board's order being clear, the Selective Service Regulations are determinative of whether the order was properly issued.[28] Assuming, as petitioner contends (Pet. 41), that the Board did not meet for the purpose of determining whether the order should issue,[29] we submit that the court below was clearly correct in holding that the Regulations make it mandatory for the Board, upon receipt from the Director of Selective Service of the assignment of a conscientious objector to a designated work project, to issue the order for him to report,[30] and that therefore "the order to report was not a discretionary order of the local draft board requiring the meeting of the board and a *determination* of the board to issue it" (R. 97).[31] The Board

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[28] *Ver Mehren* v. *Sirmyer*, 36 F. (2d) 876, 881 (C. C. A. 8); *United States ex rel. Bergdoll* v. *Drum*, 107 F. (2d) 897, 901 (C. C. A. 2).

[29] As the court below found (R. 98–99), however, the record properly raises the inference (cf. *Glasser* v. *United States*, 315 U. S. 60, 80), that the Board acted as a Board in issuing the order to report (R. 60).

[30] 32 C. F. R. 652.11.

[31] Section 10 (a) (2) of the Selective Training and Service Act (50 U. S. C. App. 310 (a) (2)) leaves to the local boards only the determination of "all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act." Questions of procedure in the assignment of, and issuance of orders to, persons already classified by the board for service, as was petitioner (R. 60–62), are determined by reference to the Regulations authorized by the Act (50 U. S. C. App. 310 (a) (1)).

had exhausted its discretionary function when, in meeting and at petitioner's behest (R. 60–62), it voted as a board to accord him the conscientious objector's classification which entailed his subsequent assignment to a work project.[32] Petitioner's further contention (Pet. 40–41) that an order signed by one member is not the order of the Board is directly contrary to the provision of the Regulations that "the chairman or a member of the local Board must sign a particular paper when specifically required to do so by the provisions of a regulation" (Selective Service Regulation 603.59), and to Form 50 (the Order to Report for Work of National Importance), which is a part of the Regulations (Selective Service Regulation 605.51) and requires only the signature of a "member of local Board." A requirement that every member sign each order would obviously be impracticable. Here the order was signed by "Louis Davlin, member of local Board," who was also its secretary (Gov. Ex. 1; R. 13, 61). Being therefore issued in conformity with the applicable regulations, it was the order of the Board, as charged in the indictment.

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[32] Petitioner's contention (Pet. 44–45) that the Board was required to determine whether the work petitioner was already doing was of national importance, and if not whether he was qualified and willing to do other work, assumes a power in the Board to set aside regulations issued by the President in the exercise of authority properly delegated to him.

Petitioner's intentional disobedience of the Board's order, which was amply evidenced by his own testimony (R. 82–83) as well as by that of other witnesses (R. 60–61, 63, 65), was not, as he now contends (Pet. 37–38), divested of the quality of wilfulness [33] by virtue of his own self-justifying opinions.[34] One may not thus place himself above the law.

IV

Petitioner assigns a multitude of alleged errors (Pet. 4, 47–55) which do not require extensive consideration.

a. The fact that five members of the jury panel were former employees of the Post Office Department provided no basis for petitioner's attack upon the panel (Pet. 47; R. 90), since bias may not be imputed on the basis alone of previous Government employment,[35] and no actual bias was charged.

b. The record references (R. 91, 98–100) on which petitioner bases his charges of prejudice

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[33] Although the indictment charged a "wilful" failure to comply with the board's order (R. 2), Section 11 of the Act (50 U. S. C. App. 311) requires only that one shall "knowingly" fail. Under either term petitioner's contention clearly has no merit.

[34] *Browder* v. *United States*, 312 U. S. 335, 340–341; *United States* v. *Illinois Central R. R. Co.*, 303 U. S. 239, 242–243. *United States* v. *Murdock*, 290 U. S. 389, 395, relied on by petitioner (Pet. 38), in no way sustains his position.

[35] *United States* v. *Wood*, 299 U. S. 123, 149; *Baker* v. *Hudspeth*, 129 F. (2d) 779, 783 (C. C. A. 10), certiorari denied, 317 U. S. 681.

toward him on the part of the courts below (Pet. 47–49) carry their own refutation of such charges.

c. At various times in the course of the trial the judge and counsel, together with the court reporter, retired to the judge's chambers to consider motions or offers of proof in the absence of the jury (R. 66, 68, 76). Petitioner challenges this procedure on the ground that he was not present in the judge's chambers (Pet. 50). But the confrontation rule has no such novel application as petitioner attributes to it. His counsel willingly participated without objection, the record does not show that petitioner was in fact barred from the conferences in the judge's chambers, and no prejudice of any kind resulted.[36]

d. A reading of the prosecutor's entire argument before the jury (R. 83–85) does not bear out petitioner's contention (Pet. 51–52) that he exceeded the bounds of propriety, as petitioner's own counsel clearly did (R. 86–87). In any event, one may not, as petitioner has done, sit idly by throughout the opposing counsel's argument without objection, and then, when it is too late to correct any possible impropriety, charge for the first time on appeal that the trial judge should have done that which he himself did not choose to do.[37]

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[36] Cf. *Johnson* v. *United States*, 318 U. S. 189, 201; *Steiner* v. *United States*, 134 F. (2d) 931, 935 (C. C. A. 5), certiorari denied, June 14, 1943, No. 1037, October Term, 1942.

[37] As in *United States* v. *Socony-Vacuum Oil Co.* 310 U. S. 150, 239, the exceptional circumstances that justify a departure from this rule are not present here.

e. The trial court's rulings concerning the admissibility of evidence, of which petitioner complains (Pet. 50–51), were free of prejudicial error. The proffered testimony and magazines, circulars, pamphlets, and letters which the court declined to receive on his behalf (R. 68–69, 75–81), were all irrelevant and were, in addition, for the most part hearsay. Petitioner's entire draft board file being in evidence (R. 71), the court clearly did not err, as petitioner contends (Pet. 49), in declining to require the Chief Clerk of the Board to produce a large entry book which was kept available for public inspection at the Board's headquarters and which, as regards petitioner, contained only recordings identical with those on the cover sheet of the file then before the court (R. 71). The admission in evidence against petitioner of his sworn statement, given to a representative of the Federal Bureau of Investigation who was called to the Milwaukee Police Headquarters to interview him shortly after he had voluntarily gone there with a policeman to whom he had made incriminating statements (R. 63–66), obviously did not violate his constitutional privilege against self-incrimination (see R. 64), as he now contends (Pet. 49, R. 64). The statement being wholly voluntary, it was plainly admissible as a prior admission.[38] Moreover, the statement was merely cumulative

[38] Cf. *Wilson* v. *United States*, 162 U. S. 613. Petitioner does not contend that error existed comparable to that in *McNabb* v. *United States*, 318 U. S. 332.

of his own testimony given at the trial by which he waived the privilege.

Contrary to petitioner's contention (Pet. 49–50), the cross-examination that the court allowed after he had taken the stand as a witness in his own behalf did not exceed the scope of his direct testimony or constitute an abuse of the court's discretion in the matter.[39]

f. The trial court's charge to the jury (R. 35–39) was eminently fair, and petitioner took no timely exception thereto (see R. 40).

CONCLUSION

Petitioner had a fair trial and his conviction is adequately supported by the evidence. No question is presented which warrants further review. It is, therefore, respectfully submitted that the petition should be denied.

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[39] *Glasser* v. *United States*, 315 U. S. 60, 83.